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OFFICE OF PETITIONS

In re Patent No. 5,788,178 :  
Issue Date: August 4, 1998 :  
Application No. 08/888,425 :  
Filed: July 7, 1997 :  
Attorney Docket No. RBAR0001-100 :

DECISION ON PETITION

This is a decision on the "REPLY TO REQUEST FOR INFORMATION", filed July 27, 2006, which is being treated as a petition under 37 CFR 1.378(e), to accept the unavoidably delayed payment of a maintenance fee for the above-identified patent.

The petition is GRANTED.

Procedural History:

- The above-identified patent issued on August 4, 1998.
- The first maintenance fee could have been timely paid during the period from August 4, 2001 through February 4, 2002, or with a late payment surcharge during the period from February 5, 2002 through August 4, 2002.

- No maintenance fee was received, and as such, the patent expired on August 5, 2002.
- The 2 year time period for filing a petition under 37 C.F.R. § 1.378(c) expired on August 5, 2004.
- Applicant filed a petition to accept the unavoidably delayed payment of the maintenance fee under 37 C.F.R. 1.378(b) on July 8, 2005.
- The petition was dismissed in a decision mailed on February 9, 2006.
- Applicant filed a request for reconsideration under 37 C.F.R. 1.378(e) on April 10, 2006.
- The Office mailed a Request for Information on June 26, 2006. The Request stated that an assertion of employee error may provide the basis for a showing of unavoidable delay, provided it is shown that: (1) the error was the cause of the delay at issue; (2) there was in place a business routine for performing the clerical function that could reasonably be relied upon to avoid errors in its performance; and (3) the employee was sufficiently trained and experienced with regard to the function and routine for its performance that reliance upon such employee represented the due exercise of due care. See MPEP 711.03(c) (III) (C) (2).

**Evidence Presented on Petition Filed July 8, 2005:**

A review of the petition reveal the following events giving arise to petitioner's assertion of unavoidable delay. Shortly after issuance of the instant patent, patentee Mr. Rolin F. Barrett, Jr., through his law firm the Mills Law Firm, sent a letter with a copy of the patent to Dr. Ronald M. Barrett at Auburn University, to put him on notice of the patent. Almost three years later, during the period for payment of the first maintenance fee in the above patent, the Mills Law Firm sent a reminder letter. However, because the last correspondence address used in the patent was the letter to Dr. Ronald M. Barrett, the reminder letter was mistakenly sent to that address. The reminder letter should have been sent to the patentee, Mr. Rolin F. Barrett. A second reminder was also sent to Dr. Ronald M. Barrett, and finally, the expiration letter. At no point did Dr. Ronald M. Barrett let the Mills Law Firm know that the reminder letters and expiration letter were sent to him erroneously. It was not until patentee engaged another law firm to file a reissue application that the expiration of the instant patent was eventually discovered.

**Relevant Statutes, Rules and Regulations:**

35 U.S.C. § 41(c)(1) states that:

The Director may accept the payment of any maintenance fee required by subsection (b) of this section which is made within twenty-four months after the six-month grace period if the delay is shown to the satisfaction of the Director to

have been unintentional, or at any time after the six-month grace period if the delay is shown to the satisfaction of the Director to have been unavoidable. The Director may require the payment of a surcharge as a condition of accepting payment of any maintenance fee after the six-month grace period. If the Director accepts payment of a maintenance fee after the six-month grace period, the patent shall be considered as not having expired at the end of the grace period.

37 C.F.R. § 1.378(b) provides that:

Any petition to accept an unavoidably delayed payment of a maintenance fee must include:

- (1) The required maintenance fee set forth in §1.20(e) through (g);
- (2) The surcharge set forth in §1.20(i)(1); and
- (3) A showing that the delay was unavoidable since reasonable care was taken to ensure that the maintenance fee would be paid timely and that the petition was filed promptly after the patentee was notified of, or otherwise became aware of, the expiration of the patent. The showing must enumerate the steps taken to ensure timely payment of the maintenance fee, the date and the manner in which patentee became aware of the expiration of the patent, and the steps taken to file the petition promptly.

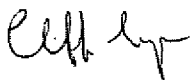
Opinion and Conclusion:

With the instant petition, petitioner has satisfactorily established employee error, which was the cause of the delay. Petitioner has shown that there was a business routine in place, and that the employee was sufficiently trained. Accordingly, it is concluded that petitioner has established that the delayed payment of the maintenance fee was unavoidable.

The maintenance fee of \$450, unavoidable surcharge fee of \$700, and the \$400 fee for filing a petition under 37 C.F.R. 1.378(e) have all been charged to Deposit Account No. 50-1275, as authorized.

The maintenance fee in this case is accepted and the above identified patent is hereby reinstated as of the mail date of this decision.

Telephone inquiries concerning this communication should be directed to the undersigned at (571)272-3207.



Cliff Congo  
Petitions Attorney  
Office of Petitions